sought to "enhance revenue" through local acts from Montgomery, as the Commission does not have taxing powers within itself. *See* R2-96-Ex. 34, p. 70. In 1996, the Commission undertook to obtain finances for the building of a new jail with such funding to come from additional court costs, a two-cent gasoline tax, and tobacco tax. *Id.*

In February 2000, certain county officials began exploring the possibility of purchasing the Russell Corporation Building, a large vacant commercial building in Ashland. In October 2000, the County Commission gave authority to the Chairman and County Administrator to negotiate the purchase of the Russell Corporation Building to convert it into a new county jail as well as offices for the Sheriff, the adult probation officers and the County Commission. An agreement was reached in the summer of 2001. The jail portion of the building was occupied in July 2003. *See* R1-86-Ex. 4, ¶ 8.

Nevertheless, during the time in which the County Commission was working with its legislative delegation to obtain financing for a new jail, the provision of funds for ongoing maintenance at the existing Clay County Jail was budgeted as in previous years with increases in each budget. *See* R2-96-Ex. 34, pp. 109-10.

Overcrowding

According to Bailey's own testimony, she often had only one cellmate, and at times, she had the cell completely to herself. *See* R1-86-Ex. 23, pp. 124, 131. At one point, Bailey's cellmate was present just on weekends because she was on work release. *Id.* at 131, 132. Early in her deposition, it appears that Bailey testified that the most cellmates she ever had at one time was three, and this apparently was for one night only. *See* R1-86-Ex. 24, p. 106. Later, she testified that there had been four or five other women in the cell but only for one weekend. *Id.* at 206-07. Other than one night (during an earlier incarceration)

when Bailey was in the administrative segregation cell (which has no bunk), Bailey had her own bunk every night. *Id.* at 205-06. Bailey was given a mattress and sheets for her bed. *Id.* at 179. Nowhere in the deposition does she attribute any injury to the alleged overcrowding.

Kitchen/Food Service

Bailey felt that the food at the jail was "inedible": too salty, foreign objects were sometimes present and there was not enough variety. Bailey alleges she tired of peanut butter sandwiches and bologna sandwiches. *See* R1-86-Ex. 24, pp. 114-16. Because she did not like what the jail was serving, at one point she just "quit eating," that is, until Mr. Buddy in the kitchen became concerned about her and began to make her grilled cheese sandwiches. *Id.* at 118. Eventually, she quit eating those as well. *Id.* at 119.

It is the policy of the Clay County Jail to provide three well-balanced meals each day to inmates. It was the responsibility of trusties to perform duties such as meal preparation and the cleaning of the kitchen.

State Health Inspector Rusty Miller personally inspected the Clay County Jail kitchen facility on December 22, 1999. The kitchen inspection yielded a score of 89, which is an acceptable rating. During this inspection of the jail kitchen, Miller noted no deficiencies in the food; food protection; personnel (hygiene); water; sewage; garbage and refuse disposal; insect, rodent, animal control; the ventilation within the kitchen; dressing rooms and other miscellaneous areas. Further, Miller noted no problem whatsoever with any presence of insects or rodents in the kitchen area. *See* R1-86-Ex. 5, ¶¶ 10, 11.

Clay County Jail Medical Care/Medication Policy and Procedure

It is the policy of the Clay County Jail to provide prompt medical attention upon any inmate's written or verbal request for medical treatment. Upon such a request, the jail staff will immediately have the inmate transported to the emergency room if it is an emergency situation or, for non-emergency complaints, Jail Administrator Jim Studdard would be notified such that he could make the first available appointment with the appropriate physician. It is also the policy of the Clay County Jail to provide any and all medications brought with the inmate to the jail or as prescribed by physicians during the inmate's incarceration. *See* R1-86-Ex. 1, ¶ 5 and Ex. 3, ¶ 5.

To the best of both Sheriff Toland's and Jail Administrator Studdard's knowledge, each and every time the Petitioner requested medical attention or was prescribed medication, such medical treatment and/or medication was provided. *See* R1-86-Ex. 1, ¶ 5 and Ex. 3, ¶ 5. As it was Sheriff Toland's policy to provide prompt medical attention to any inmate requesting the same, whether in an emergency or non-emergency situation, any denial of medical care to an inmate would have been a violation of the policy. *See* R1-86-Ex. 1, ¶ 16.

Medical Care Received by Petitioner While Incarcerated

The record is replete with examples of the medical care and attention received by Petitioner from jail staff when she was in need of medical care or requested medical care. Although Petitioner was treated medically for a variety of complaints, Petitioner's only allegation in her Amended Complaint concerning an alleged denial of medical care is: Respondents' alleged failure "to provide adequate medical care to the Plaintiff when she miscarried a few days later [after becoming pregnant], resulting in

serious consequences to her health [and] [s]everal months later, she underwent surgery as a result of the health problems created thereby." *See* R1-27-¶ 13. Details of the treatment Petitioner received as a result of her alleged sexual assault are set out below.

A. December 6, 1999

On the afternoon of December 6, 1999, Petitioner asked Jailer Josh Gregg to arrange for Petitioner to see Investigator Jean Dot Alexander because she could "smell . . . semen" when she urinated. *See* R1-86-Ex. 23, pp. 148-149. Investigator Alexander came to the jail to meet with Petitioner, who stated that "someone had had sex with [her]." *Id.* at 149. Investigator Alexander then "began [an] investigation into the incident . . . [and] transported Bailey to the Clay County Hospital . . . ." R1-27-¶ 11; R1-86-Ex. 23, p. 150.

Petitioner alleges that she could not remember anything about the incident until the next day and believes she was drugged because she had "no memory" and when she "talked to [her] mama [she] couldn't talk to her good. [Her] speech was slurred." R1-86-Ex. 23, pp. 149-50, 158-59. To the contrary, however, is the ER doctor's physical exam notation on the Petitioner, which reads "NAD [no apparent distress], alert, speech is clear." R1-86-Ex. 21(a). This and other Emergency Room records (Physicians' Records; Nursing Triage and Assessment Form) are devoid of any mention by Petitioner of being "drugged," no drug screen was ever ordered by doctors, and Petitioner admits that no one has ever confirmed such allegation. *Id.*; R1-86-Ex. 23, p. 158.

Pursuant to an allegation of sexual assault, the hospital performed a series of tests, including a urine HCG pregnancy test and a Rape Information Kit. *See* R1-86-Ex. 21(a). As the urine HCG test was positive, a serum, or

blood, HCG test (Beta-HCG) was also conducted to determine the level of the HCG, or pregnancy, hormone. The chemistry results for the Beta-HCG test was one (1), which is negative.[1] As Petitioner had already been released from the hospital and transported to the Clay County Jail, a nurse contacted the jail at 6:55 p.m. that same evening to inform Jailer Leroy Brown of the pregnancy test results, specifics about her medication and that she should be seen by "her OB doctor ASAP." *Id.*

Human chorionic gonadotropin (HCG) is made by the joining of egg and sperm after sexual intercourse. Current serum and urine testing for HCG is performed by testing for one-half of this hormone that is known as the beta subunit, thus creating the term Beta-HCG. Because other proteins can masquerade as Beta-HCG, this test can be falsely positive. The usual range for a false positive test is 5-25 IU/ml. As this patient's level was never higher than one, her test was never even high enough to be considered a false positive; it was always considered to be negative. The standard of care for most medical facilities regarding Beta-HCG tests is that any test with a level of less than 5 is considered negative; obviously, therefore, the Clay County Hospital gave the patient the benefit of the doubt; that is, they went the extra mile, in even considering the possibility that the patient could be pregnant. *See* R1-86-Ex. 27.

Later that same night, at 10:15 p.m., Petitioner was readmitted to the hospital with her chief complaint being "R/O [rule out] ectopic pregnancy." *See* R1-86-Ex. 21(b). Apparently, Petitioner was concerned about an ectopic pregnancy as she had undergone a tubal ligation (tubes tied) and, as indicated under her "past medical surgical history" previously had a tubal (or ectopic) pregnancy prior to the time of her tubal ligation. *See* R1-86-Ex.

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[1] A Beta-HCG level of less than 5 is considered a negative test for pregnancy. *See* R1-86-Ex. 27.

21(a). Because of the Petitioner's complaint of another possible ectopic pregnancy, an ultrasound was performed and the radiology report indicated "[n]o evidence of intrauterine pregnancy identified" but did not rule out an ectopic pregnancy because it may have been too early to make such a determination. *See* R1-86-Ex. 21(b). As a result, Dr. Andrews, the attending emergency room physician, informed Petitioner to "return for beta HCG every 2 days with repeat evaluation by ER doctor." *Id.* On December 10, 1999, it was decided that no further treatment was required.

On the pelvic ultrasound performed on December 6, 1999, the uterus, fallopian tubes and ovaries were all evaluated. In the ultrasound of someone in early pregnancy, the lining of the uterus would be thickened, and sometimes have a small clear space called a gestational sac. There should also be a small ovarian cyst measuring 2-3 centimeters. This small cyst, called the corpus luteum, produces hormones to support the pregnancy in its early stages. Neither of these findings was seen, and in fact, the lining of the uterus or endometrial strip was "thin with no evidence of focal thickening or fluid seen." Again, indicating no pregnancy. *See* R1-86-Ex. 27.

The production of Beta-HCG begins after the sperm and the egg have been together for about three days. Five to seven days after they join, they implant into the wall of the uterus and secrete Beta-HCG in the bloodstream. Therefore, this level is not detectable until implantation occurs. It would be impossible for a sexual encounter yielding a pregnancy to have a blood level of Beta-HCG within twelve hours. Therefore, if Petitioner was pregnant (although her Beta-HCG and ultrasound clearly suggest otherwise) it would *not* have occurred from any sexual contact on the night of December 5, 1999. *See* R1-86-Ex. 27.

B. December 7, 1999

The following day, December 7, 1999, the jail staff was contacted by Petitioner's general physician, Dr. Durant, regarding a report from the Petitioner's mother that she was "spotting (bleeding) and that she had been confirmed pregnant."[2] Dr. Durant requested that she be transported to "*our* [Dadeville] ER." *See* R1-86-Ex. 22. However, when Petitioner was advised by the jail staff that Dr. Durant requested her transport to the Dadeville emergency room, she refused to go. *Id.* An incident report of her refusal to be transported by Clay County to the Dadeville ER was documented by jail staff. *Id.* The records reflect, and Petitioner's testimony supports, that no medical requests were made by Petitioner on this date, nor did Petitioner make known to jail staff any problems she was having.

C. December 8, 1999 and December 10, 1999

As ordered by Dr. Andrews, on December 8, 1999, jail staff returned the Petitioner to the emergency room for a third Beta-HCG test, which, again, indicated a Beta-HCG of one (1). *See* R1-86-Ex. 21(c). An Outpatient Services Request was completed per orders of the Emergency Room physician, Dr. Smith, for the Petitioner to return two days later, on December 10, 1999, for a Beta-HCG test. *Id.* Again, in compliance with the original physician's orders, said staff returned Petitioner two days later on December 10, 1999 for a serum pregnancy test. Petitioner's Beta-HCG level on this date was zero (0). *Id.* No further instructions regarding testing were given by the physician or LPN on this date. *See* R1-86-Ex. 21(d).

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[2] Interestingly, the medical records from the Clay County Hospital for Petitioner's December 8 and December 10, 1999 visits include no mention whatsoever of any problems with "spotting" or "bleeding" as alleged by Petitioner's mother to Dr. Durant, and subsequently to the jail staff, on December 7, 1999. *See* R1-86-Ex. 21(c)-(d).

Undisputed Medical Testimony re: Petitioner's Alleged Miscarriage

Dr. Sharma, based on the medical documentation, opines that the Petitioner was, in fact, never pregnant. Thus, Petitioner never miscarried. Additionally, Petitioner's own testimony evidences a regular or normal menstrual cycle.

Given the information from the Emergency Room on December 6, 1999, it is doubtful that the patient was pregnant. Beta-HCG, which is a hormone made by a pregnancy three days after intercourse and found in the bloodstream 5-7 days after intercourse producing a pregnancy, was found at a level of one (1). This is consistent with a negative serum pregnancy test, in accordance with the guidelines of most medical centers. Because of the timing of the production of Beta-HCG, it would not be found in the bloodstream twelve hours after intercourse producing a fertilized egg. Further, a pelvic ultrasound performed after the patient's first visit to the ER on December 6, 1999, for which she was taken by her jailers as directed by the hospital, did not show any findings consistent with pregnancy. *See* R1-86-Ex. 27. Consequently, Petitioner had no miscarriage.

REASONS FOR DENYING THE WRIT

Petitioner has presented no basis whatsoever for the granting of her writ of certiorari to the Eleventh Circuit Court of Appeals. She has made no attempt in her petition to justify its granting based on the grounds set cut in Rule 10 of the Rules of the Supreme Court of the United States. There is no basis for this Court to conclude that the Eleventh Circuit's ruling is in conflict with other circuits, that its ruling decided an important federal question in a way that so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court.

The Court will note that this Opposition rarely mentions the Eleventh Circuit Opinion because that Opinion – well-reasoned and supported in both the law and the factual record – is hardly mentioned in Bailey's Petition.[3] Since her primary attack is on the district court's ruling, the Respondents have spent the majority of their Opposition in defending that ruling.

I. THE PETITIONER HAS NOT PRESENTED ANY BASIS FOR THE GRANTING OF A WRIT OF CERTIORARI WITH RESPECT TO THE JURY VERDICT IN FAVOR OF RESPONDENT FRANK THREATS.

Petitioner, based on her own testimony, was able to get her claim of sexual assault by Jailer Frank Threats to a jury. That jury, however, quickly saw through Petitioner's canard and as trier of fact found the issues in favor of Threats. The jury clearly believed Threats' testimony that Bailey had seduced him in an effort to "own him" – that is, use his misdeed as a tool to exercise influence over him. Clearly, such a scenario presents no constitutional violation and the trial judge properly instructed the jury. Any objection by Petitioner to the jury charges given was waived anyway. No basis for the granting of a writ of certiorari exists.

A. Bailey Failed To Properly Preserve For Appeal Her Objection To The Jury Instructions.

Rule 51 of the Federal Rules of Civil P[illegible]cedure provides that: "A party who objects to an instruction or the

[3] Petitioner quotes a paragraph from the Opinion on page 19 but never really challenges it. The contention that the Eleventh Circuit erroneously ruled that Bailey waived any objection to the jury charges (also on page 19 at n. 15) is addressed above.

failure to give an instruction must do so on the record, *stating distinctly the matter objected to and the grounds of the objection.*" The Eleventh Circuit, stressing the phrase "stating distinctly," has refused to depart from this rule except in the most narrow of circumstances, i.e., "when an error is so fundamental as to result in a miscarriage of justice or when the district court's instruction amounts to plain error." *Heath v. Suzuki Motor Corp.*, 126 F.3d 1391, 1394 (11th Cir. 1997) (quoting *Osterneck v. E.T. Barwick Indus., Inc.*, 825 F.2d 1521, 1533 (11th Cir. 1987)). Applying this law to the facts of this case, the trial court is due to be affirmed because Bailey failed to state distinctly her grounds for objection and because the failure to give the instruction sought by Bailey on appeal did not result in fundamental error or a miscarriage of justice.

In the trial court's charge conference, Bailey's counsel made two primary objections. First, he complained that the charges "did not contain anything in them about due process and the standard." R3-134-121. Second, he complained (at length) that references to "intercourse" in the charges were not preceded by the adjective "unlawful."[4] R3-134-123 to 126.

Nowhere in the trial court record, however, does one find any "distinctly stated" request for the jury to be charged on the question of whether Respondent Threats and Bailey had a "special relationship" due to Threats' "position of authority" – the focus of Bailey's appeal. *See* Petitioner's Brief before Eleventh Circuit, p. ix ("Were the jury charges given by the trial court inadequate since the instructions did not specify that Appellee Threats was in a position of authority, or rather a special relationship, over the Appellant?"). In other words, although there was

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[4] Both these objections were overruled and neither were asserted as grounds for reversal in Bailey's brief before the court of appeals. Consequently, Bailey has waived any possible error.

some general discussion of "the circumstances of jailer/inmate" and Threats' "obligation to protect the health and safety of . . . an inmate under his control," it was all in the context of whether "unlawful" should be used to describe "intercourse." *See* R3-134-121, 124. Bailey's counsel never directly asked the Court for an instruction characterizing voluntary sex between an inmate and jailer as abuse of authority or special relationship and, therefore, a constitutional violation.[6] Obviously, the district court cannot be reversed for denying an instruction that was never clearly articulated and requested. *Heath*, 126 F.3d at 1394 (overruling challenge to jury charges and explaining that "there is no indication in the record that [plaintiff] ever asked the trial court for a ruling on these legal issues or that the trial court was ever aware of the need for such a ruling."); *McClow v. Warrior & Gulf Nav. Co.*, 842 F.2d 1250, 1253 (11th Cir. 1998) (stating "it must be clear that the trial judge understood the party's position").

B. Bailey Was Not Entitled To A "Special Relationship"/"Position Of Authority" Charge.

Even if Bailey's counsel had clearly articulated a request for a "special relationship"/"position of authority" instruction, it would not have been error (much less reversible error) for the district court to refuse such a request. Although there appears to be no mandatory authority directly addressing the constitutionality of consensual sex between jailer and inmate, certain language in *Parker v. Williams*, 862 F.2d 1471, 1474 (11th Cir. 1989), *overruled on other grounds by Turquitt v. Jefferson*

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[6] None of Bailey's requested jury instructions (which were rejected by the district judge below) discuss the "special relationship"/ "position of authority" theory of liability advocated by her appellate brief. *See* R3-134-131, Court's Exhibit One to the Trial Transcript.

County, Ala., 137 F.3d 1285 (11th Cir. 1998) (en banc) and the holdings of other federal courts suggest that such intercourse, although worthy of condemnation, is not unconstitutional.

The Eleventh Circuit in *Parker v. Williams* peripherally addressed the defense of consent in a jail rape context. Sheriff Amerson defended the liability claim against him on the basis that his jailer's alleged rape of an inmate was, in reality, consensual sex.

> Sheriff Amerson attempted to introduce evidence at trial showing that there was no physical violence during the rape and that there was voluntary foreplay leading up to the rape. These facts are relevant to a jury's finding that Williams actually committed rape. The district court denied admission of this evidence based on the doctrine of collateral estoppel. The district court held that Williams' criminal conviction in Alabama state court in 1984 for kidnapping and rape collaterally estopped all defendants from challenging the fact of the rape in the civil action.

Parker v. Williams, 862 F.2d at 1474. Unfortunately (for purposes of the instant case), Amerson's "consent" defense was barred because, unlike in the instant case, the jailer had been convicted criminally of sexual assault. Nonetheless, the clear implication of the *Parker* language is that if the jailer had *not* been convicted of the sexual assault, the defense of consent would have been open to the constitutional claims against Sheriff Amerson.

The implicit conclusion in *Parker*, however, becomes explicit in at least five federal cases from outside the Eleventh Circuit. In *Rogers v. City of Little Rock, Ark.*, 152 F.3d 790, 795 (8th Cir. 1998), the circuit court affirmed the district court's determination that "the forced act of sexual intercourse violated [the arrestee]'s due process right to be free from physical abuse or sexual assault by state actors." Similarly, in *Freitas v. Ault*, 109

F.3d 1335, 1338 (8th Cir. 1997), the circuit court affirmed the district court's conclusion that a voluntary "sexual interaction" did not state a constitutional violation. *See also Fisher v. Goord*, 981 F. Supp. 140, 174 (W.D. NY 1997); *Petty v. Venus Correctional Unit*, 2001 WL 360868, *2 (N.D. Tex. 2001) ("Without some unwanted touching or coercion by the officers, a claim of sexual harassment cannot lie under the facts of this case."); *Stockman v. Lowndes County, Miss.*, 2000 WL 33907696, *4 (N.D. Miss. 2000) ("It appears well-established that while consensual conduct may violate municipal policy, it carries no constitutional implication.").

Finally, even if (assuming for the sake of argument) mandatory authority established that a constitutional violation takes place when a jailer uses his "special relationship" with an inmate or "position of authority" to obtain consent for sex – such a principle would not fit the facts of this case. Here, there was *no* testimony that Threats suggested sex and Bailey gave in because, considering his power over her, she felt she had to go along with the idea. Bailey testified that she had no recollection of intercourse but that she might have been given a date rape drug by someone and violated in her sleep. R3-134-88, 89. Obviously, this scenario was covered by the lack of consent charge given by the district court.[6] According to Threats (whom the jury obviously found credible), it was *Bailey* who solicited sex from Threats as part of a misconceived plot to gain leverage over him. *See* R3-134-41 to 43 ("[After sex] she told me that – she pointed her finger at me and said see this, this is you and I. I'm going to own you.").

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[6] "[W]hat she alleges and has to prove . . . is that he engaged in sexual intercourse with her without her consent either by intimidation, force, or by taking advantage of her while she was not consciously aware of his conduct." R3-134-171.

II. THE PETITIONER HAS NOT PRESENTED ANY BASIS FOR THE GRANTING OF A WRIT OF CERTIORARI WITH RESPECT TO THE SUMMARY JUDGMENT GRANTED TO RESPONDENTS CLAY COUNTY AND RALPH TOLAND.

Petitioner's claims against Clay County and Sheriff Ralph Toland were frivolous and were properly stricken upon summary judgment by the district court and that order was properly affirmed by the Eleventh Circuit. No basis for the granting of a petition for a writ of certiorari exists.

A. The District Court Properly Granted Sheriff Toland Summary Judgment As To All Claims Made By Petitioner – Having Found Each Claim To Be Factually And Legally Insufficient.

In its memorandum opinion granting summary judgment to Sheriff Toland, the District Court properly concluded that Bailey presented insufficient evidence of her overcrowding and food service complaints. R2-114-26. According to the district court, Bailey simply presented "no substantial evidence that the Petitioner herself suffered any injury as a result of overcrowding or inadequate food service." *Id.* Bailey's medical care claim against Sheriff Toland was dismissed by the District Court on two independent and alternative grounds: "lack of knowledge [on the part of Toland] . . . [and] qualified immunity." *Id.* Each of these conclusions – well-supported by the record and by the law of this Circuit – is due to be affirmed.

1. Respondent Toland was entitled to summary judgment on the issue of Bailey's overcrowding claim.

Bailey's argument with respect to the overcrowding, never mentioning Toland by name, asserts that "the

Appellees were aware of overcrowding at the facility." Appellant's Brief, p. 23. This argument, however, overlooks the most prominent flaw in Bailey's overcrowding claim, which is her failure to connect the overcrowding in the male inmates' section of the jail with her own constitutional rights. In other words, even if Bailey proved *part* of the jail was exceeding its design capacity, that fact does not mean that *Bailey* suffered a constitutional deprivation as a result. Bailey has no standing to assert an alleged violation inflicted upon other inmates. *See Lewis v. Casey*, 518 U.S. 343, 347, 116 S. Ct. 2179 (1996).

According to Bailey, she often had only one cellmate, just on weekends, and at times she had the cell completely to herself. *See* R1-86-Ex. 23, pp. 124, 131-32. Although her testimony varied, at the most, Bailey was incarcerated with several women for one weekend only. *See* R1-86-Ex. 24, pp. 206-07. Nevertheless, throughout her incarceration, Bailey had her own bunk every night and was given a mattress and sheets for her bed. *Id.* at 179, 205-06. Nowhere in her deposition testimony does Bailey attribute any injury to the alleged overcrowding.

As stated more fully in the "Statement of Facts," the jail records objectively show that there was never any significant or sustained problem with overcrowding in the female cells, and, in fact, the female population declined over fifty percent from 1998 to 1999, the time during which Bailey was incarcerated. *See* R1-86-Ex. 1, ¶ 6. Although there was an increase in the male population during that same time period, this overcapacity situation in no way affected the downstairs female cells. *Id.* In fact, Health Department Inspector Rusty Miller, who inspected the jail quarterly, does not recall any problem with overcrowding in the female cell area. *See* R1-86-Ex. 5, ¶ 15.

Even if Bailey had suffered a constitutional deprivation due to overcrowding, Toland could be liable only if he knew about it and then was deliberately indifferent to that

fact. Bailey presents no evidence of such knowledge or of Toland's deliberate indifference. The fact that he knew some of the male inmates were experiencing overcrowding (which he was trying to address anyway), does not prove that he had any personal knowledge of Bailey's condition on the rare occasion she might have had more than one other inmate in the cell with her.

Not only has Bailey failed to overcome qualified immunity by stating a constitutional claim with respect to overcrowding, she has also failed to identify any clearly established law which would have put Toland on notice that his conduct toward Bailey was unconstitutional.

2. Respondent Toland was entitled to summary judgment on the issue of Bailey's food service claim.

Bailey's chief complaint concerning food is a lack of variety, although she also alleges that the food was too salty and sometimes contained foreign objects. *See* R1-86-Ex. 24, pp. 114-16. Bailey's complaints about the food simply do not rise to the level of a constitutional claim nor do they prove any deliberate indifference on the part of Sheriff Toland. *See Hamm v. DeKalb County*, 774 F.2d 1567, 1575 (11th Cir. 1985); *French v. Owens*, 777 F.2d 1250, 1255 (7th Cir. 1985); *Ramos v. Lamm*, 639 F.2d 559 (10th Cir. 1980). *See also Rhodes v. Chapman*, 452 U.S. 337, 101 S. Ct. 2392 (1981); *Wilson v. Seiter*, 501 U.S. 294, 111 S. Ct. 2321 (1991). Neither has Bailey proved that Toland had personal knowledge of her complaints about the jail food but was deliberately indifferent to those complaints. Additionally, Bailey has failed to identify any clearly established law, which would have put Toland on notice that his conduct toward Bailey (with respect to jail food) was unconstitutional.

3. Toland was entitled to summary judgment on the issue of Bailey's medical care.

Bailey alleged in her complaint that Respondents failed "to provide adequate medical care to the Petitioner when she miscarried a few days [after becoming pregnant], resulting in serious consequences to her health [and] [s]everal months later, she underwent surgery as a result of the health problems created thereby." R1-27-¶ 13. As fully set forth in the "Statement of Facts," none of the record evidence supported this conclusion. Moreover, no evidence connected Toland with knowledge of her medical complaints. Appellant's argument never even mentions Toland by name.

a. Bailey has offered no competent medical evidence that she was pregnant, that she miscarried or that she suffered any "serious consequences to her health."

In order to establish a jail medical care claim, "[f]irst, a plaintiff must set forth evidence of an objectively serious medical need." *Farrow v. West*, 320 F.3d 1235, 1243 (11th Cir. 2003); *see also Gaudreault v. Municipality of Salem*, 923 F.2d 203 (1st Cir. 1990). Bailey has failed to clear this initial hurdle. To the contrary, Respondents have offered the only competent medical testimony in the form of an affidavit and report by Dr. Lee Sharma, a board-certified gynecologist practicing in Alabama. After examining Bailey's medical records, she concludes that Bailey was most likely never pregnant, never suffered a miscarriage and that any subsequent problems she experienced were due to a pre-existing disease and not anything that happened at the Clay County Jail (and certainly nothing related to Sheriff Toland or his policies). *See* R1-86-Ex. 27,

p. 1 of Affidavit, pp. 5-6 of Report. These opinions are unrefuted by Bailey.

b. Even if Bailey had experienced a serious medical need at the jail, there is no evidence of deliberate indifference by Toland (or any of the jail staff).

Without recounting all the medical attention Bailey received at the jail, it cannot be overemphasized that Sheriff Toland, sued in his individual capacity, can be held liable only for actions he took or policies he instituted. *See, i.e., Hardin v. Hayes*, 957 F.2d 845, 849 (11th Cir. 1992) ("Supervisory officials are not liable under section 1983 on the basis of respondeat superior or vicarious liability."); *see also Provost v. City of Newburgh*, 262 F.3d 146, 154 (2nd Cir. 2001). Yet, it is undisputed that Toland had no interaction or personal involvement with Bailey, and Bailey failed to challenge Toland's policies. Bailey's contention (before the district court) that Toland can be held personally liable for facts he did not know but "should have known" is contrary to the standard for deliberate indifference set by the Supreme Court in *Farmer v. Brennan*, 511 U.S. 825, 114 S. Ct. 1970 (1994). *See Steele v. Shah*, 87 F.3d 1266, 1270 (11th Cir. 1996). Even if Toland could be held liable for the medical care provided to Bailey by his staff, the care given Bailey far exceeded constitutional requirements.

4. Petitioner has offered no "clearly established law" sufficient to deprive Sheriff Toland of qualified immunity.

The burden is on the Petitioner to show that the Respondent official has violated a clearly established right and that the law was clearly established. *Saucier v. Katz*, 533 U.S. 194, 201, 121 S. Ct. 2151 (2001). Bailey has cited

no authorities justifying the denial of qualified immunity to a sheriff under these undisputed facts. *See generally*, *Anderson v. Creighton*, 483 U.S. 635, 107 S. Ct. 3034 (1987).

B. The District Court Properly Granted Clay County Summary Judgment As To All Claims Made By Petitioner – Having Found Each Claim To Be Factually And Legally Insufficient.

In general, the Constitution requires only that jail authorities provide the "minimal civilized measure of life's necessities . . . [; it] does not mandate comfortable prisons." *Rhodes v. Chapman*, 452 U.S. 337, 347-49, 101 S. Ct. 2392 (1981). Further, deprivations must be "sufficiently grave" before they form the basis of an Eighth (or Fourteenth) Amendment violation. *Wilson v. Seiter*, 501 U.S. 294, 298, 111 S. Ct. 2321 (1991). Bailey has failed to show that she was denied the minimal necessities of civilized life or that she experienced anything more than discomfort (if that) due to the alleged overcrowding and inadequate food service at the Clay County Jail. She has certainly shown no deliberate indifference on the part of Clay County to her condition. While it may be true, as Bailey contends, that "governments can always improve the food [and] living conditions . . . at these detention facilities by increasing funds for those facilities," it does not follow that the failure to perpetually increase funding equates to a constitutional violation. *See Hamm v. DeKalb County*, 774 F.2d 1567, 1573 (11th Cir. 1985).

In its September 16, 2003 Memorandum Opinion granting summary judgment to Clay County, the District Court properly concluded that Bailey presented insufficient evidence of her overcrowding and food service complaints. R2-114-26. According to the district court, Bailey simply presented "no substantial evidence that the Plaintiff herself

suffered any injury as a result of overcrowding or inadequate food service." *Id.* Bailey's medical care claim against Clay County was rejected by an earlier memorandum opinion of the District Court which found no basis to hold Clay County responsible for the medical care provided at the Clay County Jail. R2-110-30, 31. Finding support both in the record and in the law of this Circuit, the District Court's granting of summary judgment to Clay County is due to be affirmed.

1. Clay County was entitled to summary judgment on the issue of Bailey's overcrowding claim.

As stated in Sheriff Toland's argument above, the most prominent flaw in Bailey's overcrowding claim is her failure to connect the overcrowding in the male inmates' section of the jail with her own constitutional rights. In other words, even if Bailey proved that *part* of the jail was exceeding its design capacity, that fact does not mean that *Bailey* suffered a constitutional deprivation as a result.

But, even if Bailey could overcome the dearth of evidence concerning how overcrowding in general caused specific constitutional violations to her, she has not offered any evidence of how Clay County knew of these specific injuries to Bailey and yet was deliberately indifferent to them. At the district court level, Bailey relied on certain Alabama Code sections apparently to make the point Clay County "should have been aware" of Bailey's overcrowding injuries (if they existed). But, such objective knowledge is insufficient to establish notice after the United States Supreme Court's ruling in *Farmer v. Brennan*, 511 U.S. 825, 114 S. Ct. 1970 (1994). *See Steele v. Shah*, 87 F.3d 1266, 1270 (11th Cir. 1996) (discussing *Farmer*'s standard).

To the extent that Clay County Commissioners, like John Wheeles, were aware of overcrowding in the jail, the problem was limited to the upstairs portion of the jail

where the male cells are located.[7] *See* R1-86-Ex. 34 at 23. Nonetheless, the County Commission was anything but deliberately indifferent to this knowledge. Realizing its duty to "fund the [jail] facility, build a new one or [renovate the] existing [jail]," the Commission sought to "enhance revenue" through local acts from Montgomery, as the Commission does not have taxing powers within itself. *See* R1-86-Ex. 34, p. 70.

As set out more fully in the record below, the County Commission explored numerous avenues and undertook several different methods by which to increase money for the funding of the jail or for a new jail. As the district court found below, Clay County Commission's efforts were ongoing. *See* R2-114-3, 4; *see also* R1-86-Ex. 4, ¶¶ 6-8; R2-96-Ex. 34, pp. 70, 109-10.

Bailey has failed to create a genuine issue as to whether she was injured by the overcrowding experienced in other parts of the jail, as to whether Clay County was aware of her personal injuries (which she has never proven), and as to whether Clay County was deliberately indifferent to her situation. Consequently, Clay County was entitled to summary judgment.

2. Clay County was properly granted summary judgment on Bailey's claim concerning jail food.

As stated in the argument on behalf of Sheriff Toland above, Bailey's complaints about the food simply do not rise to the level of a constitutional claim. *See Hamm v. DeKalb*

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[7] Simply because the jail was operated at excess capacity does not mean there was a constitutional violation, as long as the overflow did not lead to deprivations of food, medical care or sanitation. *See Rhodes v. Chapman*, 452 U.S. 337, 348, 101 S. Ct. 2392 (1982). Further, temporary periods of overcrowding do not implicate constitutional concerns. *Hamm v. DeKalb County*, 774 F.2d 1567, 1575 (11th Cir. 1985).

County, 774 F.2d 1567, 1575 (11th Cir. 1985). Even if Bailey had proven that the jail food service somehow violated her constitutional rights, she has completely failed to establish a case for deliberate indifference. Commissioner Wheeles was never made aware of any problem with the food at the jail. *See* R1-86-Ex. 34, pp. 91, 97. Additionally, as recounted in detail in Sheriff Toland's argument above, the jail enforced policies aimed at making sure the food service was adequate and the jail received a score of 89 from a health department inspection the month Bailey was there. Bailey has utterly failed to create a genuine issue of fact concerning whether her Eighth or Fourteenth Amendment rights were violated by the jail food service or concerning whether Clay County was deliberately indifferent to her alleged violations.

3. Clay County was entitled to summary judgment on Bailey's lack of medical care claim.

In *Marsh v. Butler County*, 268 F.3d 1014, 1026 n. 6 (11th Cir. 2001) (en banc), the Eleventh Circuit, sitting en banc, when addressing a plaintiff's claim for deliberate indifference against both the county and the sheriff, noted that "under Alabama law the County is not responsible for assuring procedures are in place for inmates to get medical care." Alabama law assigns counties a "limited role in building and funding the jails." Similarly, Clay County was entitled to summary judgment on Bailey's deliberate indifference to a serious medical need claim.

a. To the extent a medical care claim has been and can be alleged against the County, Bailey has proven no serious medical need.

Assuming Petitioner alleges a claim for deliberate indifference to a serious medical need against Clay

County, such claim fails as there is no serious medical need, as set out above with respect to allegations against Sheriff Toland.

b. Even if Bailey had proven a serious medical need, she was unable to produce any evidence that Clay County was aware of that need.

While proof of a serious medical need is *necessary* for Bailey to state a constitutional claim, it is not, in and of itself, sufficient. In other words, even if Bailey produced evidence of a serious medical need, she must go further and also present evidence indicating that Clay County was aware of a serious medical need and yet ignored it. *See Farmer v. Brennan*, 511 U.S. 825, 837, 114 S. Ct. 1970 (1994). There is no evidence in the record that Clay County or the Clay County Commission had any knowledge of Bailey's medical status or that she had a serious medical need for which she not getting the appropriate medical attention (if that were the case).

c. Bailey cannot produce evidence of deliberate indifference.

Since Bailey lacks proof that the County knew (or even had a reason to know) about her alleged medical conditions, there is certainly no evidence that the County demonstrated deliberate indifference to her medical needs.

CONCLUSION

Based on the foregoing, Respondents request that this Court refuse to grant the Petition for a Writ of Certiorari.

Respectfully submitted, this 17th day of August, 2005.

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